



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 23 OF 2011
HACIENDA DEVELOPMENT HOLDINGS LTD

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION BY PANGEA DEVELOPMENT HOLDINGS LTD

R U L I N G

1. Before the Court is a Notice of Motion application dated 11th December, 2011 brought under the aegis of **Sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Order 40 Rule 7 and Order 45 Rule 1 (1) (a)** of the *Civil Procedure Rules*. The Applicant seeks the following prayers:

- a. THAT the application be certified as urgent and service be dispensed with in the first instance;
- b. THAT the Ruling of 22nd November, 2011 and all other consequential orders thereof be reviewed and set aside;
- c. THAT the costs of this application be deemed as costs in the cause.

2. The application is predicated upon the grounds set out on its face. It is alleged that the Respondent relied on false service for the Notice of Motion dated 10th July, 2011. The Applicant has never been served with any proceedings or hearing notices as regards this matter and thus its failure to appear and attend court was not deliberate. The Applicant further alluded to the fact that it would be in the interest of justice if the Ruling was set aside and proceedings re-opened to allow it to be heard.

3. The application is supported by the affidavit of **Adam George Henry Tuller** sworn on 11th December, 2011. In reiterating the grounds set out in the application, the Applicant contended that the Respondent fraudulently and willfully used the wrong address for service of summons, a fact that the Respondent was well aware of. It was also the Applicant's contention that the Respondent had colluded with the firms of **Messrs Kiptiness & Odhiambo Associates** and **Bowyer & Mahihu Advocates** to obtain judgments and or rulings by false service and pretense.

4. In opposing the application, the Respondent filed its Affidavit in Reply sworn on 28th December, 2012. The deponent contends that the Respondent was never aware of any change of address, even in his capacity as a Director in the applicant company, and to which, in any event, no notice of change of address had been issued to the Registrar of Companies highlighting the same. It was further deposed that

the Applicant has come to Court with unclean hands and in any event would suffer no prejudice should the Order sought not be granted. It was the Respondent's contention that the Orders issued by the Court vide its ruling of 22nd November, 2011 were to preserve the assets of the company pending forensic investigations and it had not shown in its application, any justification or merits as to why the said Ruling and consequential orders thereto should be set aside.

5. The Applicant contends that it had never been served with any summons or notice of the hearing of the application dated 11th July, 2011 from which the Court issued an ex-parte ruling. At the hearing of the application on 14th March, 2013, Mr. Billing on behalf of the Applicant submitted that the address **P.O BOX 15219-00509 NAIROBI** did not belong to the applicant. He submitted that the respondent had all along been aware of the change of address to **P.O BOX 10639-80101 MOMBASA** since 2007. He produced various documents as exhibits showing that indeed its address has always been in Mombasa, contrary to the Respondents allegations. The exhibit marked as "**AT-1**" shows that the address was rented out to one **Tuller Adam Lynne** between 01-03-2000 and 01-03-2012 and later allocated to another person.

6. The Respondent's case is that it had exercised all due diligence in ensuring that the Applicant had been properly served with the notices and summons. In its affidavit it is averred that it had endeavored to serve upon the Applicant the Notice of Motion, exhibited by the process server's affidavit dated 9th August, 2011 and marked as "**BB-2**". It goes further to attest that it also sought substituted service vide an application dated 11th August, 2011. Prayers were granted for service by registered post. The Respondent effected service by registered post but the same was returned unreceived. Mr. Odhiambo, in submitting on behalf of the Respondent, cited Order 5 on Service in which the provisions therein state that the process server can just leave the application at the registered office. He reiterated that service was proper and that the two companies belonging to the Applicant had inter-changeable addresses. He submitted that it was the onus of the Applicant to prove that it had not received the notice and summons.

7. The issue for determination in whether there was proper service of notices and summons to the Applicant. It is not in doubt that the Respondent, Mr. Bruce Bouchard, is a co-director of the Applicant Company. This fact is not disputed and is in fact alluded to severally in the submissions and affidavits, particularly at paragraph 6 of the Replying Affidavit. This being the fact, and as per the submissions by Mr. Odhiambo, the two companies used addresses inter-changeably. Did the Respondent therefore, exhaustively address all the available avenues of service upon the Applicant? Why did it not send the notices and summons to the Mombasa office, being well aware that the Applicant also had an address there as well as in Nairobi?

8. In the ruling of Ogola, J in **Civil Case No. 33 of 2011** between the same parties, the learned judge addressed the issue of service as follows:

"I acknowledge that the company registry should be notified of change of address by a company. However, in the present case the plaintiff has not successfully rebutted the allegations that they knew of the plaintiff's place of business in Mombasa as alluded by the defendant. There seems to be non-disclosure on the part of the plaintiff. Substituted service should only be resorted to after the party serving has explored all means available to them in effecting service and failed. In the circumstances, I am inclined to give the defendant the benefit of doubt on whether or not he received the court pleadings."

9. This was similar to the position adopted by the Court of Appeal in **Civil Appeal No. 129 of 1993 Joseph Katana Ngala v Kenya Finance Corporation Ltd (Nairobi)** in which the learned appellate judges held, *inter alia*:

"The appellant therefore, not having been served with the summons, judgment in default should not have been entered against him and no subsequent proceedings after the entry of such judgment can cure the initial fundamental defect. The attention of Mrs. Gudka having been drawn to the decision of this court in the case of Filimina Afwadi Yalwala v Ronald Indimuli & Jared Shindu Civil Appeal No. 69 of 1987 (Kisumu) in which this court held that

there cannot be effective substituted service unless reasonable steps have been taken in vain to effect personal service and the whereabouts of the person to be served are unknown, very properly conceded the appeal on the ground that there had been no effective service on the appellant.”

10. Having considered the application, the affidavits and submissions made herein, the Court has an unfettered discretion to set aside the Ruling arising from the Respondent’s ex-parte application, provided in so doing, no injustice is occasioned to the opposing party. The orders emanating from the Court’s Ruling delivered on 22nd November, 2011 are conservatory in nature and were granted to preserve the company’s assets pending the forensic audit. If indeed the Respondent had been honest in its intentions, i.e. to preserve the company’s assets pending a forensic audit, it would have been of utmost courtesy, respect and professional etiquette to have informed the Applicant of its intentions and its pending application. Its failure to serve upon the Applicant the application dated 10th July, 2011 and the issuance of notices of the hearing only raises a distraction. The Respondent’s contention that it was unaware of the change of address is a fallacy since it did admit that it knew of the Mombasa address, and that the same was used inter-changeably between the parties. In my view, it did not expend due diligence in ensuring that service of summons was properly served upon the applicant at the Mombasa address. The Orders of this Court granted on 22nd November 2011, were issued ex-parte, without the applicant having the benefit of being heard on the application.

11. It is in the best interest of justice that all parties to litigation be given a fair and just opportunity to be heard. This opportunity was clearly not afforded to the Applicant. The Respondent is not in a position, therefore to claim that no prejudice shall be occasioned upon the Applicant should the orders issued by the Court not be set aside as prayed for. The Applicant has established that indeed, prejudice has been occasioned upon it and has shown clear and proper justification on the application. The court hereby determines that the application before it has merits and makes orders as follows:

- a. **The orders issued by the Court on 22nd November, 2011 are hereby set aside;**
- b. **The application dated 10th July, 2011 be served upon the Applicant within 28 days;**
- c. **As the suit property as well as the Applicant are located at Mombasa, I direct that this file shall be transferred to the Mombasa District Registry of the Court for trial and disposal, under the powers conferred upon the Court by the provisions of Order 47, rule 6 (2) of the Civil Procedure Rules, 2010.**
- d. **One this file has been transferred to the Mombasa District Registry, the application dated 10th July 2011 will be set down for inter-parties hearing on a priority basis on a date to be taken by the parties at the Mombasa District Registry but only after it has been properly served on the Applicant.**

DATED and DELIVERED at NAIROBI this 28th day of May 2013.

J. B. HAVELOCK

JUDGE